87-337

No.

Supreme Court, U.S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAIRO IGNACIO AMARIS,
Petitioner,

VS.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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QUESTION PRESENTED

CAN A VALID WAIVER OF THE DEFENDANT'S RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDINGS BE FOUND WHERE THE RECORD ESTABLISHES THE DEFENDANT WAS NOT INFORMED OF THE PROCEEDING UNTIL AFTER IT HAD OCCURRED?

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IN THE SUPREME COURT

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OCTOBER TERM, 1986

No.

JAIRO IGNACIO AMARIS,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Ninth Circuit

Jairo Ignacio Amaris, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered on

May 29, 1987.

OPINIONS BELOW

The memorandum of the United States Court of Appeals for the Ninth Circuit was filed on May 29, 1987 in case number 86-1260 and is unreported. A copy of said memorandum appears herein as Appendix "A". Petitioner's timely Petition for Rehearing was denied by order of the Court on July 2, 1987. A copy of said order denying rehearing appears here as Appendix "B".

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

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STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Sixth Amendment; and
2. Federal Rules of Criminal Procedure, Rule 43.

The relevant statutory provisions are set forth in Appendix "C" of this Petition.

STATEMENT OF THE CASE

On January 3, 1986, petitioner and others were charged by Superseding Indictment with various violations of Title 21, United States Code, the federal drug laws. The principal and most serious of these accusations was that petitioner violated the Continuing Criminal Enterprise Statute, 21 U.S.C. section 848.

On July 15, 1986, pursuant to a plea bargain, petitioner pled guilty to the Continuing Criminal Enterprise count, as alleged in Count One of the Superseding

Indictment, as well as to violation of 21 U.S.C. section 841(a)(1) -- distribution of a controlled substance (cocaine). In return for petitioner's guilty plea, the government promised to recommend no more than twenty (20) years in prison. (E.R. Doc. 391, p.3.) Sentencing was set for September 4, 1986.

The reporter's transcript of the September 4, 1986 proceedings reveals that prior to the "official" sentencing, a meeting took place in the trial judge's chambers. This meeting was attended by the probation officer, the prosecutor and petitioner's trial counsel. There was no court reporter present. Petitioner was excluded for this in-chambers, off-the-record discussion.

Following the in-chambers meeting, the judge announced "that a rather extensive discussion before convening this session of the court was held in-chambers in

which the Government's attorney, the probation officer and defense counsel had an opportunity to discuss rather forcefully and extensively the proposed sentence in this matter." He then said to petitioner's trial counsel, "[b]ut go ahead and make a statement for the record as you wish." (E.R. Doc. 386, p.3.)

After defense counsel made "a couple of comments", the judge sentenced petitioner to a term of twenty (20) years in prison under the Continuing Criminal Enterprise Count. (E.R. Doc. 386, p.10.) This was the maximum sentence which the government was entitled to recommend under the plea agreement.

In its memorandum, the United States Court of Appeals for the Ninth Circuit recognized that "the record reflects a forceful and extensive in camera discussion, from which petitioner was excluded, regarding [petitioner's]

proposed sentence. We cannot say that the exclusion under these circumstances was not error and could not raise the possibility of prejudice." Nevertheless, the Court of Appeals refused to reach either the issue of whether petitioner's exclusion from the in camera discussion violated his right of confrontation under the Sixth Amendment or violated Rule 43 of the Federal Rules of Criminal Procedure, because it found that by failing to object to the issue of his absence during the in chambers conference, petitioner waived his right to be present. (Appendix "A", p.3.)

REASONS FOR GRANTING THE WRIT

A Decision of the Court of Appeals Misinterpreted this Court's Decision in United States v. Gagnon which it Found to Control the Outcome of the Case.

The decision of the United States Court of Appeals for the Ninth Circuit

recognized that the in camera conference regarding petitioner's proposed sentence was one from which petitioner's absence could have been prejudicial and therefore may have implicated petitioner's constitutional and statutory right to be present. (Appendix "A", p.3.) However, the court refused to reach the question because, relying upon this Court's decision in United States v. Gagnon, 470 U.S. 552, 105 S.Ct. 1482 (1985), the Ninth Circuit found that petitioner "... by failing to object to the issue of his absence during the chambers conference waived any right to be present." (Appendix "A", p.3.)

Petitioner contends that the Court of Appeals misinterpreted this Court's decision in Gagnon and that certiorari should be granted to correct this misinterpretation and to provide guidance to the lower courts in future cases in

which this important issue arises.

In United States v. Gagnon, supra, the defendants and respondents before this Court argued their constitutional and statutory rights to be present at critical stages of the proceeding had been violated when the trial judge held a conference with one of the jurors which was attended by defense counsel but not by the defendants. This Court found that the Gagnon defendants had waived their right to be present at the conference. The Court expressly noted that the trial judge, "in open court, announced her intention to speak with the juror in chambers, and then called a recess ... Respondents neither then nor later in the course of the trial asserted any Rule 43 rights they may have had to attend this conference." 105 S.Ct. at 1485. Concluding that the defendants in Gagnon had waived their right to be present, the

Court stated: "A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present." Id.; emphasis added.

Petitioner AMARIS contends that in the instant case there is nothing in the record from which one could infer that he knew of the in camera discussion and that he knowingly and voluntarily agreed to be absent from this critical portion of the sentencing process. The record is clear that petitioner AMARIS did not even know of the in-chambers conference until after it had concluded and the formal sentencing proceedings were well under way. A valid waiver requires the intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Petitioner could not have intentionally waived his right to be present at the in-chambers conference when he had no knowledge that the

conference was being conducted.

The Ninth Circuit appears to have relied upon language in Gagnon that the petitioners in that case had not objected to the jury conference from which they had been excluded at any time during the trial of the matter. Nor had the Gagnon petitioners filed a post-trial motion raising the issue. The specific language in Gagnon is that:

> The in camera discussion took place during the recess and trial resumed shortly thereafter with no change in the jury. Respondents neither then nor later in the course of the trial asserted any Rule 43 rights they may have had to attend this conference at any time. No objections of any sort were lodged, either before or after the conference. Respondents did not even make any post-trial motions, although post-trial hearings may often resolve this sort of claim. United States v. Gagnon, supra, 105 S.Ct. at 1485.

However, the Court's discussion of the

failure to object after the jury conference had concluded or to raise the issue by post-trial motion is pure dicta. It is clear that the Gagnon defendants waived their rights to attend the jury conference by not objecting at the time the trial judge announced her intention to conduct such a conference. The appropriate time to interpose an objection to an in camera conference taking place without the defendants being present was when the defense learned of the proposed conference. An objection made after the in camera conference occurred would have been untimely under the circumstances present in Gagnon. See, e.g., United States v. Chaney, 662 F.2d 1148, 1151 fn.3 (5th Cir. 1981) [objection to judge conducting waiver hearing in presence of jury made after hearing conducted was untimely]. See also, United States v. Perez, 651 F.2d

268, 273 (5th Cir. 1981). The reason for requiring objections to be made when the court announced its intention to conduct an in camera hearing without the defendant being present was to give the court an opportunity to rectify the claimed error in excluding the defendant. United States v. Woodner, 317 F.2d 649 (2d Cir. 1963), cert. den. 375 U.S. 903. The court would not have an opportunity to rectify the claimed error if no objection had been made until after the in camera conference had been completed. As discussed above, the instant case is distinguishable from Gagnon on the crucial point that here petitioner did not have knowledge of the trial court's intention to conduct an in camera sentencing proceeding from which he was excluded until after the conference had been completed. Petitioner therefore did not have an opportunity to raise a timely

objection and the absence of such an objection should not prejudice him. F.R.Crim.P., Rule 51; United States v. Mathis, 535 F.2d 1303, 1307 (D.C. Cir. 1976).

Finding a defendant waived his constitutional and statutory rights to be present by failing to object to a conference the existence of which he was unaware until it had been concluded is also at variance with other decisions of this Court which have discussed the requirements of a valid waiver of a fundamental constitutional right. Most notably is Johnson v. Zerbst, supra, the 1938 decision which remains the standard of what conduct constitutes a valid waiver of a constitutional right. In Johnson, the government argued the petitioners waived their right to counsel. This Court pointed out that "courts indulge every reasonable

presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, supra, 304 U.S. at 414. Thereafter, this Court went on to announce the principle that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Id. Finally, this Court noted that the purpose of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." Id., at 465.

This Court has held steadfast to the principle of the strong presumption against waiver of fundamental

constitutional rights and the requirement that a valid waiver must be one which is knowingly and intelligently made. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948) [waiver of right to counsel invalid where court made only a routine inquiry followed by defendant executing standard written waiver of counsel form and the record did not affirmatively establish defendant understood the nature of the charges, the statutory offenses included within them, range of possible penalties and possible defenses at the time the alleged waiver occurred]; McCarthy v. United States, 394 U.S. 459, 466 (1969) [because plea of guilty is waiver of fundamental constitutional rights, trial judge must conduct colloquy with defendant prior to accepting tendered plea in order to determine if waiver of constitutional rights is knowingly, intelligently and

voluntarily made]; Carnley v. Cockran, 369 U.S. 506, 516 (1962) [waiver of right to counsel may not be inferred from a silent record; the record must affirmatively demonstrate defendant, knowing of his right to counsel, intelligently and understandingly declined counsel]; Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322 (1968) [defendant did not waive his right to cross-examine government witness at trial by declining to conduct cross-examination at preliminary hearing because defendant did not know witness would be unavailable at trial when he decided not to cross-examine at preliminary hearing].

Each of the above cases clearly reiterates the principles that: (1) there is a strong presumption against the waiver of fundamental constitutional rights; (2) waiver will not be found from a silent record, and (3) waiver will only

be valid if the record affirmatively demonstrates the defendant, knowing of a constitutional right, made a voluntary and intelligent decision to relinquish such right.

The decision of the Ninth Circuit is at odds with each of these fundamental constitutional principles. The Ninth Circuit found petitioner waived his constitutional and statutory rights to be present at a critical stage of the proceeding by failing to object to a conference of which he had no knowledge. The Court presumed waiver of a fundamental constitutional right, and it found a valid waiver from a silent record. This Court's decision in Gagnon did not compel a finding of waiver under these circumstance.

This Court should grant the instant Petition to clarify its decision in United States v. Gagnon and provide

guidance to the lower courts which will be called upon to interpret Gagnon's strictures in future cases.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

DATED: August 21, 1987.

Respectfully submitted,

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(Appendices Follow)

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED MAY 29, 1987]

UNITED STATES OF AMERICA,	NO. 86-1260
Plaintiff-Appellee,	D.C.# CR-85-1002-JPV
vs.	**MEMORANDUM**[1]
JAIRO IGNACIO AMARIS, also known as Michael Soto, also known as John Connor, also known as Michael Murphy, also known as John Goodman,	
Defendants-Appellants	

Appeal from the United States
District Court
for the Northern District of California
Honorable John P. Vukasin, Jr.
District Judge, Presiding
Argued and Submitted April 13, 1987

Before: CHAMBERS, GOODWIN and TANG, Circuit Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Amaris appeals from the imposition of sentence in the district court. We affirm.

Amaris contends that the in chambers conference of court, counsel and probation office to the exclusion of Amaris violated his right to be present. Fed. R. Crim. P. 43 restates existing law which recognizes a defendant's right to

> ... be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

The explicit language of the rule recognizes that the right of presence does not attach during certain phases of adversary proceedings, e.g., at a conference or argument upon a question of law. Fed. R. Crim. P. 43(c)(3). The Supreme Court has long recognized that the right is not violated by absence "when presence would be useless, or the

benefit but a shadow." Snyder v. Massachusetts, 291 U.S. 97, 106-07 (1934). See Polizzi v. United States, 550 F.2d 1133 (9th Cir. 1976). Where absence could be prejudicial under the circumstances, however, exclusion violates a defendant's right of presence. See id. at 1138; Snyder, supra at 106-07. Here, the record reflects a forceful and extensive in camera discussion, from which Amaris was excluded, regarding Amaris' proposed sentence. We cannot say that the exclusion under these circumstances was not error and could not raise the possibility of prejudice.

Nevertheless, we need not reach the question. Amaris was informed by the court of that conference. Amaris by failing to object to the issue of his absence during the chambers conference waived any right to be present. See United States v. Gagnon, 470 U.S. 522

(1985); United States v. McClendon, 782 F.2d 785, 788-89 (9th Cir. 1986); Williams v. United States, 358 F.2d 325, 330 (9th Cir. 1966). We note particularly the lack of any actual prejudice to Amaris. There was and is no indication that he was not represented effectively and competently by counsel at the conference. See United States v. Veatch, 674 F.2d 1217, 1226 (9th Cir. 1981); Polizzi, supra at 1137. He was present when sentence was imposed and exercised his right of allocution. See Taylor v. United States, 385 F.2d 835 (8th Cir. 1967) (per curiam), cert. denied, 393 U.S. 879 (1968). Amaris' sentence conformed and was in accordance with the plea agreement in all respects. See United States v. Potts, 813 F.2d 231 (9th Cir. 1987).

AFFIRMED.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED JUL 2, 1987]

UNITED STATES OF AMERICA,	)	NO. 86-1260
	)	D.C.# CR-85-1002-JPV
Plaintiff-Appellee,	)	
vs.	)	
JAIRO IGNACIO AMARIS, also known as Michael Soto, also known as John Connor, also known as Michael Murphy, also known as John Goodman,	)	ORDER DENYING PETITION FOR REHEARING
Defendants-Appellants	)	

Before: CHAMBERS, GOODWIN and TANG, Circuit Judges.

The panel has considered the appellant's Petition for Rehearing. The Petition for Rehearing is denied.

APPENDIX "C"

STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT VI --

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain

during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, section 3(35), 89 Stat. 376.